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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 733

STEVE TANDARIC,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

TO THE UNITED STATES CIRCUIT COURT OF APPEALS. FOR THE SEVENTH CIRCUIT.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

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THE UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, the Chief Justice and Associated Justices of the Supreme Court of the United States.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

Your petitioner, STEVE TANDARIC, an alien, seeks a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit to review a judgment of that Court affirming a judgment of conviction in a criminal case by the District Court of the United States for the Northern District of Indiana, South Bend Division for violation of 8 U. S. C., 1940 ed., sec. 746 (a) (18), which is a part of the Nationality Act of 1940, and which makes it a felony punishable by fine and imprisonment for an alien to represent himself to be a citizen of the United States.

STATUTE UNDER WHICH JURISDICTION IS INVOKED.

This Court has jurisdiction to entertain this petition for a writ of certiorari under section 240 (a) of the Judicial Code as amended June 7, 1934. (28 U. S. C., 1940 ed., sec. 347 (a)). The judgment of the Circuit Court of Appeals was entered on November 17, 1945 (R. 65). On November 27, 1745, petitioner filed in said Court a petition for rehearing (R. 67), within the time prescribed by the rules of said Court, which petition for rehearing was denied on December 7, 1945 (R. 80). This petition for a writ of certiorari is filed in this Court within thirty days after the denial of the petition for rehearing as prescribed by Rule XI of the Rules of Criminal Procedure after Verdict of Guilt as amended on February 11, 1943 (18 U. S. C., 1940 ed., Sup. IV, following section 689), computed in accordance with Rule XIII of said Rules as amended March 17, 1941 (8 U. S. C., 1940 ed., following sec. 688).

STATEMENT OF BASIS FOR JURISDICTION.

Statute Involved.

Section 346 of the Nationality Act of 1940 (approved October 14, 1940, and in effect ninety days after the date of approval), 54 Stat. 1163 (8 U. S. C., 1940 ed., sec. 746), provides in part:

> "(a) It is hereby made a felony for any alien or other person, whether an applicant for naturalization or citizenship, or otherwise, and whether an employee of the Government of the United States or not—
>
> * * * * *
>
> "(18) Knowingly to falsely represent himself to be a citizen of the United States without having been naturalized or admitted to citizenship, or without otherwise being a citizen of the United States."
>
> * * * * *
>
> "(d) Any person violating any provision of subsection (a) of this section shall be fined not more than $5,000, or imprisoned not more than five years, or both."

The Indictment, the Proceedings and the Pertinent Jurisdictional Facts.

Petitioner was indicted in the District Court of the United States for the Northern District of Indiana, South Bend Division, on September 22, 1944. The indictments contains one count which charges that petitioner "on or about the 2d day of February, 1942, being then and there an alien, did then and there unlawfully, wilfully, knowingly and feloniously, falsely represent himself to Bendix Home Appliance Corporation, South Bend, Indiana, and to the

officials of the Bendix Home Appliance Corporation, to be a citizen of the United States" (R. 2). The indictment bears the following notation: "T. 8, Sec. 746 (a) (18)."

Petitioner moved to quash the indictment on the ground that the statute upon which it is founded is unconstitutional (R. 8), which motion was overruled (R. 8). Petitioner pleaded not guilty, and on the trial before a jury he moved for a directed verdict at the close of the Government's case and was overruled (R. 8-9, 26), and at the close of all the evidence he again moved for a directed verdict and was overruled (R. 9, 27). The jury returned a verdict of guilty (R. 27). Thereafter petitioner filed a motion for a new trial (R. 29-30), which motion was overruled on the ground that it was not filed in apt time, and also on its merits (R. 33). Petitioner was thereupon sentenced to imprisonment for a term of two years (R. 33).

Your petitioner is an alien. He was born in 1907 in Yugoslavia, which was then a part of Austria. He came to the United States in 1911 with his mother whose maiden name was Rebic (R. 16). Petitioner's father, John Tandaric, apparently came to the United States prior to 1911. Petitioner's father was never naturalized and petitioner was never naturalized. Petitioner's brother, Emil Tandaric, was born in the United States and died in the United States in 1917 (R. 16). Since arriving in the United States, petitioner resided in the vicinity of Hammond, Indiana (R. 13), and worked in the Industrial area of his home at his trade as a machinist.

Petitioner worked for the Standard Pullman Co., from 1925 to 1931 and from then to 1937 he was unemployed most of the time. No sooner would he get a job than he would be discharged. He was a member of the C.I.O., and was advised that it was necessary to change his name in order to procure employment. Previous to 1941 he held various jobs of short duration at the General American Tank Car Cor-

poration, Inland Steel Co., Union Carbide Co., and similar jobs at other industries (R. 26). At the time of the trial in March 1945, and for three years prior thereto, he was employed as a machinist by the Harbeson & Walker Co., in defense work (R. 26).

Petitioner began to work for the Bendix Corporation, according to one witness, about five months before November 1941 (R. 11), and according to another witness, he began to work for that corporation in July 1941, was temporarily laid off for a week in November of that year, and then worked there until February 16, 1942 (R. 15).

(The documentary evidence in this case consists of ten exhibits, numbered 1, 2, 3, 4, 5, 7, 8, 9, 10 and 11, all of which were introduced by the Government. Exhibits numbered 2, 3, 4, 5, 8, 9 and 10 were not contained in the printed transcript if the record in the Court below and are not contained in the printed record in this Court. By order of the Court below these seven original exhibits were considered by that Court without the same being printed (R. 52), and by a further order of that Court these seven original exhibits have been transmitted to this Court (R. 81). Exhibits 2, 3 and 4 are set out in the Appendix following the supporting brief, respectively as appendices A, A-1, B and C. Appendices A and A-1 are the two sides of a card and are reproduced in the exact size of the original.)

The oral evidence of the crime charged in the indictment consists of petitioner's admission on the trial that he is an alien (R. 27); the testimony of Steger, an agent of the Federal Bureau of Investigation, that petitioner admitted to him that "he had represented to Bendix that he was a citizen when he obtained employment in July 1941 and that later in February 1942," he represented "that he was born in Chicago, Illinois." (R. 12); the testimony of Chapman, a former assistant general manager of the Bendix

Corporation, that it was not the policy of that corporation to employ aliens, and that he interviewed petitioner when he first sought employment and that he then told him that he was a citizen (R. 15).

The documentary evidence of the crime charged in the indictment consists of four exhibits numbered 1, 2, 3 and 4. Exhibit 1 (R. 13-14) is an extrajudicial confession, and recites in part as follows:

> "About July 1941, I went to South Bend, Indiana and made application at the Bendix Home Appliance Corporation using the name of Robert Rebic and stated that I was born in Chicago, Illinois. I secured employment upon this representation and was employed there on the assembly line until March 1942. Approximately in February of 1942 I was fingerprinted in connection with the national defense program, still giving my name as Robert Rebic and stating that I was born in Chicago, Illinois. * * * I used the name of Robert Rebic and stated that I was a citizen of the United States in order to obtain employment."

To establish the corpus delicti by evidence independent of the confession, the Government introduced in evidence exhibits 2, 3 and 4 (Appendices A, A-1, B and C). The authentication of these exhibits consists of a statement that was introduced in the bill of exceptions and which recites that the evidence on the trial "connected and identified the defendant with" these and other exhibits (R. 60), and the testimony of Reinke who stated that he was employed as Personnel Director and Superintendent of Industrial Relations, and as such, he had charge of the records of Bendix Home Appliance Inc., and that exhibits 2, 3 and 4 produced by him "represented the employment record of the defendant." (R. 15) There is no evidence as to who prepared these records, or that petitioner was informed of the contents of exhibit 2, other than the seniority memor-

andum on the face thereof (Appendix A). The statement in the opinion of the Circuit Court of Appeals as to the preparation of this exhibit is untenable, as pointed out in the petition for rehearing (R. 72-73).

The only evidence corroborating the confession contained in exhibit 1 as to false statements made by petitioner to his employer in *July* 1941, and *February* 1942, are the recitations in exhibits 3 and 4 (Appendices B and C). These recitations are that petitioner was born in "Chicago," and "Ill." The decision of the Circuit Court of Appeals affirming the conviction can find no support in the evidence without holding that these statements were tantamount to a representation that petitioner was a citizen of the United States. And such a holding is in conflict with the views of this Court expressed in *Elk* v. *Wilkins*, 112 U. S. 94, 101-102, and with the decisions of Circuit Courts of Appeal in *Lam Mow* v. *Nagle*, 24 Fed. 2d 316, 318, and *Reynolds* v. *Haskins*, 8 Fed. 2d 473, 475.

The Government upon the introduction of evidence *in chief*, introduced the following testimony and documentary proof of offenses committed by petitioner several years prior to the offense charged in the indictment, and which were in no way connected with that offense:

1. That petitioner obtained a passport to Spain 1937 by false representations, and that he obtained a permit to reenter the United States by illegal means (Steger's testimony, R. 12). Petitioner's objections to this testimony were overruled (R. 12).

2. That in 1937 petitioner obtained a passport to Spain by using the birth certificate of his deceased brother Emil Tandaric, and that he obtained a permit to reenter the United States by illegal means (Waters' testimony, R. 16). Petitioner by his counsel objected to this testimony, moved to strike the same and to instruct the jury to dis-

regard the same, but his objection and his motions were overruled (R. 16).

3. Documentary evidence which showed that petitioner served in the armed forces of the Spanish Republic, as a member of the Lincoln Battalion of the International Brigade, and that he was thus engaged in influencing the political activities of a foreign government (R. 19-21, Exhibit 7, items 10, 11 and 15; Exhibit 10, item 37).

Petitioner, testifying in his own behalf, stated his name and address, his place of employment and the places where he had been employed since 1925; that he was born in Yugoslavia and came to the United States in 1911, and that he is an alien; that he is a member of the C.I.O., and that from 1931 to 1937 he had difficulty in securing employment and was advised to change his name. He further stated that he did not at any time represent to the Bendix Corporation or to any of its officials that he was a citizen of the United States (R. 26). On cross-examination he was directed, over his objections, to tell the jury "that he falsified his citizenship in order to go to Spain to fight on the Loyalist side in 1937," and that "he falsified use of his brother's name to obtain that passport," and "that he committed perjury in order to reenter the United States." (R. 27.)

The oral as well as the documentary evidence which the Government introduced in chief, as also upon cross-examination, of offenses committed by petitioner several years prior to the offense charged in the indictment and which had no connection with the offense for which he was being tried, was so unfair as to be a denial of due process. (*Boyd* v. *United States*, 142 U. S. 450, 458; *Johnson* v. *United States*, 318 U. S. 189, 195.) The introduction of that evidence was a departure from the accepted and usual course of procedure in criminal cases, and this departure has been sanctioned in this case by the Circuit Court of Appeals.

QUESTIONS PRESENTED.

A. Is the Statute valid?

I. Whether 8 U.S.C. 746 (a) (18) is so vague, indefinite and ambiguous as to be void under and repugnant to the due process clause of the Fifth Amendment.

II. Whether 8 U.S.C. 746 (a) (18) is void under and repugnant to the freedom of speech clause of the First Amendment.

III. Whether Congress was empowered to enact 8 U.S.C. 746 (a) (18) under the power granted by Article I, sec. 8, cl. 4 of the Constitution, "To establish a uniform rule of naturalization."

IV. Whether 8 U.S.C. 746 (a) (18) is void because it was not enacted under any power granted by the Constitution, and is in no way concerned with the alien's residence in this country.

B. What is the meaning of the Statute?

I. Whether the statute makes the false representation a criminal offense so long as it is made for a fraudulent purpose without regard to whether the wrongful act offends the laws of a State or the laws of the United States.

II. Whether the Statute permits conviction even though no fraudulent intent existed, so long as person making inquiry of the alien had some adequate reason for ascertaining his citizenship. What is such adequate reason?

III. Whether the Statute requires the misrepresentation to be material and knowledge by alien of such materiality.

C. Does the competent evidence sustain the conviction?

I. Whether there is any competent evidence tending to sustain the charge in the indictment that petitioner knowingly falsely represented his citizenship in February, 1942.

II. Whether there is any proof of the *corpus delicti* other than the purported extrajudicial admissions by petitioner.

D. Did the Trial Court seriously prejudice petitioner's rights and defense by erroneous rulings on evidence at the trial?

I. Whether there was prejudicial error in admitting evidence of other crimes or offenses, where such evidence was not relevant to any issue in the case and was not offered to prove intent or for the purpose of impeachment.

II. Whether there was prejudicial error in admitting documents where there was no proof that these documents were made by petitioner or at his instance or direction.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

1. There are here presented for decision the important questions of Federal law which have not been but should be settled by this Court, namely, the validity of 8 U.S.C. 746 (a) (18) under the First, Fifth and Tenth Amendments to the Constitution.

2. There is here presented for decision the important question of Federal law which has not been but should be settled by this Court, namely, the construction and interpretation of 8 U.S.C. 746 (a) (18). As a corollary to this reason it is also suggested that there is a conflict in the decisions of the several Circuit Courts of Appeal in construing this Statute as shown by

United States v. *Achtner*, 144 Fed. 2d 49, 52 (C.C.A. 2, 1944).

Prevost v. *United States*, 149 Fed. 2d 747, 748 (C.C.A. 9th, 1945).

United States v. *Frederick*, 50 Fed. Supp. 769, 772 (D.C. Tex. aff'd 146 Fed. 2d 488, C.C.A. 5th, 1945. Cert. denied 65 Sup. Ct. 866).

United States v. *Romberg*, 150 Fed. 2d 116 (C.C.A. 2d, 1945).

3. There is a conflict between the decision by the Circuit Court of Appeals for the Seventh Circuit in the case at bar and the decision in *Prevost* v. *United States*, 149 Fed. 2d 747 (C.C.A. 9, 1945) with regard to the ruling concerning admissibility of documents. This question of procedure is peculiar to trials of aliens since almost invariably the Government relies in part on documents similar to those involved in the case at bar.

4. The Circuit Court of Appeals in affirming the con-

viction sanctioned the trial court's rulings in admitting hearsay documents, and evidence of other crimes. These rulings seriously prejudiced petitioner's rights. The jury found petitioner guilty where there was no competent evidence to sustain the charge laid in the indictment. Exercise of this Court's power of supervision is necessary to avoid harsh injustice to petitioner and to guide all Federal trial courts in future analogous cases.

5. This case involves a question of gravity and general importance to all aliens in this country. Problems involving aliens present issues that must be decided by this Court on the basis of the broadest policies of national welfare, and not to visit "hardship on an alien for slight or insubstantial reasons." (*Bridges* v. *Wixon*, 65 Sup. Ct. 1443, 1446, 1449), and not on the basis of a local policy, as one which has been characterized as a "witch hunt" in *Frederick* v. *United States*, 146 Fed. 2d 488 (C.C.A. 5, 1944).

In the light of past post-war assaults on the economic and political rights and privileges of aliens, the instant decision is a source of potential danger to all aliens. The administration of this section of the Nationality Act should be based upon and guided by an authoritative and precise decision by this Court of last resort. The boundaries of that section of the Nationality Act should be fixed by this Court so that injustice to aliens will be avoided.

6. The punishment in this case is harsh and infamous (*Mackin* v. *United States*, 117 U. S. 348, 352), and is imposed on petitioner on the sole charge that he *told a lie*. The charge does not involve moral turpitude, or evil intent or purpose. It is unknown how many aliens have been goaded by economic necessity to run afoul of the challenged provision of the statute, but it is known that the number of aliens who have been denied employment during the War period was so large that our former At-

torney General Francis Biddle on December 27, 1941, was moved to make a public statement in which he said that the barring of aliens from employment is an economic waste and stupid error (New York Times, Dec. 28, 1941, p. 4). And a week later, our late President Franklin D. Roosevelt said in a public statement. "I am deeply concerned over the increasing number of reports of employers discharging workers who happen to be aliens." (New York Times, Jan. 3, 1942, p. 32.) It is of vital importance to many aliens, and to the enforcers of the Nationality Act of 1940, that the challenged provision of this Act be construed by this Court so that the enforcement thereof shall not operate to subject aliens to criminal prosecution, deportation, and denial of naturalization, for the commission of an act the criminal nature of which is not free from grave doubt.

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the Circuit Court of Appeals for the Seventh Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and the proceedings of the Circuit Court of Appeals for the Seventh Circuit in the case docketed therein as No. 8817, and entitled The United States of America, *Plaintiff-appellee vs.* Steve Tandaric, *Defendant-appellant,* to the end that this cause may be reviewed and determined by this Court, as provided by the Statutes of the United States; that the judgment of said Circuit Court of Appeals be reversed by this Court; and that petitioner may have such further relief as this Court may deem proper.

STEVE TANDARIC,
Petitioner,

By HAROLD J. FINDER,
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